

Takeover and Takeover-Code

Restructuring in its literal sense means, "changing the basic structure"

Every company big or small has a basic capital structure as far as its share capital is concerned which is approved by its Memorandum of Association. This structure of a company cannot be changed before the company has actually gone through certain procedures of law.

Restructuring of a company is generally of two types

1. **Organic Restructuring** - This refers to any internal change in the structure of the company, without the corporate entity undergoing any change. Some examples of such kind of restructuring are buy back of securities by a company, Employee Stock Option Plan (ESOP) by a company or Reduction of share capital of a company. All these kinds of restructuring have to be done by a company under different circumstances, sometimes they are to give value to their shareholders (as in the case of rights issue) or sometimes as an incentive to their employees (as in issue of sweat equity) or sometimes as a defensive measure from hostile take over (as in the case of buy back of securities).
2. **Non organic Restructuring** - This refers to an overall change in the corporate entity of the company. Unlike organic restructuring, there is an element of third party involved in it. The foremost examples of this type of restructuring are Merger and amalgamation, de-merger, reorganization of a company.

TAKEOVER

Generally, Takeover refers to the acquisition of one company by another company.

In Legal terms, it has been defined as - :

"a transaction or a series of transactions, whereby a person acquires control over the assets of a company, either directly by becoming the owner of those assets, or indirectly by obtaining control of the management of the company. Where shares are closely held (i.e. by small number of persons), a takeover will generally be effected by agreement with the holders of the majority of the share capital of the company being acquired.

Where the shares are held by the public generally the take over may be effected:

1. ***By agreement between the acquirers and the controllers of the acquired company.***
2. ***By purchase of shares on the stock exchange.***
3. ***By means of a takeover bid.***

KINDS OF TAKE OVERS

1. **In Legal Context :-**
 - Friendly Take Over
 - Bail Out Take Over
 - Hostile Take Over
2. **In Business Context :-**
 - Horizontal Take Over
 - Vertical Take Over
 - Conglomerate

Take Over in Legal Context

Friendly Take Over	Bail Out Take Over	Hostile Take Over
Takeover of one company by change in its management & control through negotiations between the existing promoters and prospective investor in a friendly manner. Thus it is also called Negotiated Takeover . This kind of takeover is resorted to further some common objectives of both the parties. Generally, friendly takeover takes place as per the provisions of Section 395 of the Companies Act, 1956.	Takeover of a financially sick company by a financially rich company as per the provisions of Sick Industrial Companies (Special Provisions) Act, 1985 to bail out the former from losses.	Hostile takeover is a takeover where one company unilaterally pursues the acquisition of shares of another company without being into the knowledge of that other company. The most dominant purpose which has forced most of the companies to resort to this kind of takeover is increase in market share. The hostile takeover takes place as per the provisions of SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997

Take Over in Business Context

Horizontal Take Over	Vertical Take Over	Conglomerate
Takeover of one company by another company in the same industry. The main purpose behind this kind of takeover is achieving the economies of scale or increasing the market share. E.g. takeover of Hutch by Vodafone.	Takeover by one company, of its suppliers or customers. The former is known as Backward integration and latter is known as Forward integration. E.g. takeover of Sona Steerings Ltd. By Maruti Udyog Ltd. is backward takeover. The main purpose behind this kind of takeover is reduction in costs.	Takeover of one company by another company operating in totally different industries. The main purpose of this kind of takeover is diversification.

PROS & CONS OF TAKEOVERS

Pros

Cons

- Increase in sales/revenues (e.g. Procter & Gamble takeover of Gillette)
- Venture into new businesses and markets
-
- Increase in the profitability of target company

- Increased market share
- Decrease competition (from the perspective of the acquiring company)
- Reduction of overcapacity in the industry
- Enlarge brand portfolio (e.g. L'Oréal's takeover of Bodyshop)
- Increase in economies of scale
- Reduced competition and choice for consumers in oligopoly markets. (Bad for consumers, although this is good for the companies involved in the takeover)
- Likelihood of job cuts.
- Cultural integration/conflict with new management
- Hidden liabilities of target entity.
- The monetary cost to the company

REVERSE TAKE OVER

In a reverse takeover, shareholders of the private company purchase control of the public company and then merge it with the private company. The private company shareholders receive a substantial majority of the shares of the public company and control of its board of directors. The transaction can be accomplished within weeks.

The transaction involves the private and public company, exchanging information on each other, negotiating the merger terms, and signing a share exchange agreement. At the closing, the public company issues a substantial majority of its shares and board control to the shareholders of the private company. The private company's shareholders pay for the public company, by contributing their shares in the private company to the company that they now control. This share exchange and change of control completes the reverse takeover, transforming the formerly privately held company into a publicly held company.

Benefits of Reverse Take Over

1. The advantages of public trading status include the possibility of commanding a higher price for a later offering of the company's securities.
2. Going public through a reverse takeover allows a privately held company to become publicly held at a lesser cost, and with less stock dilution than through an initial public offering (IPO). While the process of going public and raising capital is combined in an IPO, in a reverse takeover, these two functions are separate. A company can go public without raising additional capital. Separating these two functions greatly simplifies the process.
3. Reverse takeover is less susceptible to market conditions. Conventional IPOs are risky for companies to undertake because the deal relies on market conditions, over which senior management has little control. If the market is off, the underwriter may pull the offering. The market also does not need to plunge wholesale. If a company in registration participates in an industry that's making unfavorable headlines, investors may shy away from the deal.
4. In a reverse takeover, since the deal rests solely between those controlling the public and private companies, market conditions have little bearing on the situation.
5. The process for a conventional IPO can last for a year or more. By contrast, a reverse takeover can be completed in as little as thirty days.

Drawbacks of Reverse Take Over

A major disadvantage of going public via a reverse merger is that such transactions only introduce liquidity to a previously private stock if there is bona fide public interest in the company.

TAKE OVER REGULATIONS

The regulations have been known as, Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Guidelines, 1997 or TAKEOVER CODE. Since then many amendments have been made to the regulations.

Objective of the regulations

The objective of the Takeover code is to regulate in an organized manner the substantial acquisition of shares and take over of a company whose shares are quoted on a stock exchange i.e. listed company.

These regulations also apply to certain unlisted companies including a body corporate incorporated outside India to an extent where the acquisition results in the control of a listed company by the acquirer.

Although, the term 'Takeover' has not been defined under the said Regulations, the term "Takeover", basically envisages that

An **acquirer :-**

1. taking over the **control**
2. or management of the **target company**
3. **When an acquirer, acquires substantial quantity of shares or voting rights of the target company, it results in the Substantial acquisition of Shares.**

Definitions :-

- **Acquirer :** An acquirer means any individual/company/any other legal entity which intends to acquire, or acquires :-
 - Substantial quantity of shares, or
 - Voting rights of target company or
 - Acquires or agrees to acquire control over the target company.
 - It includes persons acting in concert (PAC)
- **Person Acting in Concert (PAC).** – Comprises of
 - Persons who, for a common objective or purpose of substantial acquisition of shares, or voting rights, or gaining control over the target company, pursuant to an agreement , directly or indirectly co-operate by acquiring or agreeing to acquire shares or voting rights in the target company or control over the target company.

Following persons will be deemed to be persons acting in concert :-

- a company, its holding company, or subsidiary of such company or company under the same management either individually or together with each other;
- a company with any of its directors, or any person entrusted with the management of the funds of the company;
- directors of above mentioned companies & their associates;
- mutual fund with sponsor or trustee or asset management company;
- foreign institutional investors with sub account(s);
- merchant bankers with their client(s) as acquirer;
- portfolio managers with their client(s) as acquirer;
- venture capital funds with sponsors;

- Banks with financial advisers, stock brokers of the acquirer, or any company which is a holding company, subsidiary or relative of the acquirer. (This does not apply to a bank whose sole relationship with the acquirer or with any company, which is a holding company or a subsidiary of the acquirer or with a relative of the acquirer, is by way of providing normal commercial banking services or such activities in connection with the offer, such as confirming the availability of funds, handling acceptances and other registration work etc)
- any investment company with any person who has an interest as director, fund manager, trustee, or as a shareholder having not less than 2% of the paid-up capital of that company or with any other investment company in which such person or his associate holds not less than 2% of the paid up capital of the latter company.

An associate , as mentioned above means:

- any relative of that person within the meaning of section 6 of the Companies Act, 1956 (1 of 1956); and
 - Family trusts and Hindu Undivided Families.
- **Target Company** –A company that has been chosen as attractive for takeover by a potential acquirer.
 - **Control** - Control includes the right to appoint directly or indirectly, or by virtue of agreements, or in any other manner, majority of directors on the Board of the target company or to control management or policy decisions affecting the target company

TRIGGERING OF TAKE OVER CODE

The said Regulations have discussed this aspect of 'substantial quantity of shares or voting rights' separately for following different purposes:

- **5% or more shares or voting rights:**
 - Any acquirer, who acquires shares or voting rights which (taken together with shares or voting rights, if any, held by him) would entitle him to more than 5 % or 10 % or 14 % or 54 % or 74 % shares or voting rights in the target company, in any manner whatsoever, shall disclose at every stage the aggregate of his shareholding or voting rights in that company to the target company and to the stock exchanges where shares of the target company are traded.
 - The acquirer shall **disclose purchase or sale aggregating two percent. or more of the share capital** of the target company to the target company, and the stock exchanges where shares of the target company are listed within two days of such purchase or sale along with the aggregate shareholding after such acquisition or sale
- **More than 15% shares or voting rights:**
 - Any acquirer, who acquires shares or voting rights which (taken together with shares or voting rights, if any, held by him) would entitle him to more than to exercise 15 % or more of the voting rights in a company, unless such acquirer makes a public announcement to acquire to acquire at least additional 20% of the voting capital of the target company from the shareholders through an open offer in accordance with the Regulations.
 - An acquirer, who holds more than 15% shares or voting rights of the target company, shall within 21 days from the financial year ending March 31 make yearly disclosures to the company in respect of his holdings as on the mentioned date.

- The target company is, in turn, required to pass on such information to all stock exchanges where the shares of target company are listed, within 30 days from the financial year ending March 31 as well as the record date fixed for the purpose of dividend declaration.
- ***Consolidation of holdings***
 - An acquirer who is having 15% or more but less than 55% of shares or voting rights of a target company, can consolidate his holding up to 5% of the voting rights in any financial year ending 31st March. However, any additional acquisition over and above 5% can be made only after making a public announcement.
 - An acquirer, who is having 55 % or more, but less than 75 % of shares or voting rights of the target company, shall acquire either by himself or through persons acting in concert with him any additional shares or voting rights therein, unless he makes a public announcement to acquire shares in accordance with these Regulations (Provided that in a case where the target company had obtained listing of its shares by making an offer of at least 10% of issue size to the public in terms of clause (b) of sub-rule (2) of rule 19 of the Securities Contracts (Regulation) Rules, 1957, or in terms of any relaxation granted from strict enforcement of the said rule, , then this regulation shall apply as if for 75 % , 90 % is substituted)
 - An acquirer, who holds 55% or more but less than 75% of the shares or voting rights in a target company; and is desirous of consolidating his holding while ensuring that the public shareholding in the target company does not fall below the minimum level permitted by the Listing Agreement, he may do so only by making a public announcement in accordance with these regulations. Regulations (Provided that in a case where the target company had obtained listing of its shares by making an offer of at least 10% of issue size to the public in terms of clause (b) of sub-rule (2) of rule 19 of the Securities Contracts (Regulation) Rules, 1957, or in terms of any relaxation granted from strict enforcement of the said rule, , then this regulation shall apply as if for 75 % , 90 % is substituted)
 - In case of disinvestment of a Public Sector Undertaking , an acquirer who together with persons acting in concert with him, has made a public announcement, shall not be required to make another public announcement at the subsequent stage of further acquisition of shares or voting rights or control of the Public Sector Undertaking provided
 - Both the acquirer and the seller are the same at all the stages of acquisition, and
 - Disclosures regarding all the stages of acquisition, if any, are made in the letter of offer & in the first public announcement.]

For the purposes of above mentioned points, acquisition means and include:- (a) Direct acquisition in a listed company to which the regulations apply; (b) Indirect acquisition by virtue of acquisition of companies, whether listed or unlisted, whether in India or abroad.

- ***Acquisition of control over a company***
 - No acquirer shall acquire control over the target company, unless such person makes a public announcement to acquire shares and acquires such shares in accordance with the Regulations.
 - The above provision will not apply to any change in control which takes place in pursuance to a special resolution passed by the shareholders in a general meeting.

- For passing of the special resolution, facility of voting through postal ballot shall also be provided.

For the purposes of above mentioned points, acquisition mean and include :

direct or indirect acquisition of control of target company by virtue of acquisition of companies, whether listed or unlisted and whether in India or abroad

Pre-requisite for making a public offer stating the acquisition of substantial quantity of shares or voting rights - Before making any public announcement of

offer, the acquirer shall appoint a merchant banker, who is not associate of or group of the acquirer or the target company

Public Announcement

- The public announcement shall be made by the merchant banker, not later than four working days of entering into an agreement for acquisition of shares or voting rights or deciding to acquire shares or voting rights exceeding the above mentioned percentages
- In respect of Acquisition of control over the company, the public announcement shall be made by the merchant banker not later than four working days after any such change have been decided that would result in the acquisition of control over the target company by the acquirer.
- Incase of indirect acquisition or change in control, a public announcement shall be made by the acquirer within three months of consummation of such acquisition or change in control or restructuring of the parent or the company holding shares of or control over the target company in India

How should the Public Announcement be made ?

- The public announcement shall be made in all editions of one English national daily ,one Hindi national daily and one regional language daily with wide circulation at the place where the registered office of the target company is situated and at the place of the stock exchange where the shares of the target company are most frequently traded.
- After the publication in the above mentioned news papers, , a copy of the public announcement shall be - :
 - submitted to the Board through the merchant banker
 - sent to all the stock exchanges on which the shares of the company are listed for being notified on the notice board
 - sent to the target company at its registered office for being placed before the Board of Directors of the company.

Contents of the Public Announcement of Offer

The public announcement shall contain the following :-

- Paid up share capital of the target company, the number of fully paid up and partly paid up shares
- Total number and percentage of shares proposed to be acquired from the public, subject to a minimum percentage
- Minimum offer price for each fully paid up or partly paid up share
- Mode of payment of consideration

- Identity of the acquirer(s) ; in case the acquirer is a company / companies, the identity of the promoters and, or the persons having control over such company and the group, if any, to which the company belong
- Existing holding, if any, of the acquirer in the shares of the target company, including holdings of persons acting in concert with him;
- Existing shareholding, if any, of the merchant banker in the target company
- Salient features of the agreement, if any, such as the date, the name of the seller, the price at which the shares are being acquired, the manner of payment of the consideration and the number and percentage of shares in respect of which he acquirer has entered into the agreement to acquire the shares or the consideration, monetary or otherwise, for the acquisition of control over the target company, as the case maybe
- Highest and the average price paid by the acquirer or persons acting in concert with him for acquisition, if any, of shares of the target company made by him during the twelve month period prior to the date of public announcement.
- Object and purpose of the acquisition of the shares and future plans, if any, of the acquirer for the target company, including disclosures whether the acquirer proposes to dispose of or otherwise encumber any assets of the target company in the succeeding two years, except in the ordinary course of business of the target company.
- If the future plans are set out , the public announcement shall also set out how the acquirers propose to implement such future plans.
- An undertaking that the acquirer shall not sell, dispose of or otherwise encumber any substantial asset of the target company except with the prior approval of the shareholders.
- Specified Date
- Date by which individual letters of offer would be posted to each of the shareholders;
- Date of opening and closure of the offer and the manner in which and the date by which the acceptance or rejection of the offer would be communicated to the shareholders
- Date by which the payment of consideration would be made for the shares in respect of which the offer has been accepted
- Disclosure to the effect that firm arrangement for financial resources required to implement the offer is already in place, including details regarding the sources of the funds whether domestic i.e from banks, financial institutions, or otherwise or foreign i.e., from Non-Resident Indians or otherwise.
- Provision for acceptance of the offer by person(s) who own the shares but are not the registered holders of such share
- Statutory approvals, if any, required to be obtained for the purpose of acquiring the shares
- Approvals of banks or financial institutions required, if any; whether the offer is subject to a minimum level of acceptance from the

shareholders.

- Any other information as is essential for the shareholders to make an informed decision in regard to the offer.

Minimum Offer Price

The offer to acquire shares shall be the highest of :-

- the negotiated price under the agreement, or;
- the highest price paid by the acquirer or persons acting in concert with him for acquisitions, if any, including by way of allotment in a public or rights or preferential issue during the twenty six week period prior to the date of public announcement, or ;
- Average of the weekly high and low of the closing prices of the shares of the target company as quoted on the stock exchange where the shares of the company are most frequently traded during the twenty six weeks, or, the average of the daily high and low of the prices of the shares as quoted on the stock exchange where the shares of the company are most frequently traded during the two weeks preceding the date of public announcement, whichever is higher.

[The third parameter of the offer price, as mentioned above, shall not be applicable in case of disinvestment of a Public Sector Undertaking., but the relevant date for the calculation of the average of the weekly or daily high and low of the closing prices of the shares of the Public Sector Undertaking, as quoted on the stock exchange where its shares are most frequently traded, shall be the date preceding the date when the Central or the State Government opens the financial bid]

Where the shares of the target company are infrequently traded, the offer price shall be determined by the acquirer and the merchant banker in the following manner:

- the negotiated price under the agreement
- the highest price paid by the acquirer or persons acting in concert with him for acquisitions, if any, including by way of allotment in a public or rights or preferential issue during the twenty six week period prior to the date of public announcement;
- other parameters including return on net worth, book value of the shares of the target company, earning per share, price earning multiple vis- a-vis the industry average:

Notes:

- Where considered necessary, the Board may require valuation of such infrequently traded shares by an independent merchant banker (other than the manager to the offer) or an independent chartered accountant of minimum ten years' standing or a public financial institution.]
- Shares shall be deemed to be infrequently traded, if on the stock exchange, the annualised trading turnover in that share during the preceding six calendar months prior to the month in which the public announcement is made is less than five percent. (by number of shares) of the listed shares. For this, weighted average number of shares listed during the said six months period may be taken.
- In case of shares which have been listed within six months preceding the public announcement, the trading turnover may be annualised with reference to the actual number of days for which the shares have been listed.
- In case of disinvestment of a Public Sector Undertaking, the shares of such an undertaking shall be deemed to be infrequently traded, if on the stock exchange,

the annualised trading turnover in the shares during the preceding six calendar months prior to the month, in which the Central or the State Government opens the financial bid, is less than five per cent. (by the number of shares) of the listed shares. For this, weighted average number of shares listed during the six months period may be taken.

Other Points

- In case of disinvestment of a Public Sector Undertaking, whose shares are infrequently traded, the minimum offer price shall be the price paid by the successful bidder to the Central or the State Government, arrived at after the process of competitive bidding of the Central or the State Government for the purpose of disinvestment.
- Where the acquirer has acquired shares in the open market or through negotiation or otherwise, after the date of public announcement at a price higher than the offer price stated in the letter of offer, then, the highest price paid for such acquisition shall be payable for all acceptances received under the offer. Provided that no such acquisition shall be made by the acquirer during the last seven working days prior to the closure of the offer.
- The offer price for partly paid up shares shall be calculated as the difference between the offer price and the amount due towards calls-in-arrears or calls remaining unpaid together with interest, if any, payable on the amount called up but remaining unpaid.
- Where the public announcement of offer is pursuant to acquisition by way of firm allotment in a public issue or preferential allotment, the average price shall be calculated with reference to twenty six week period preceding the date of the board resolution which authorised the firm allotment or preferential allotment.
- The offer price for indirect acquisition or control shall be determined with reference to the date of the public announcement for the parent company and the date of the public announcement for acquisition of shares of the target company, whichever is higher

Mode of Payment of Offer Price

The offer price shall be payable -

- in cash , or
- by issue, exchange and, or transfer of shares (other than preference shares) of acquirer company, if the person seeking to acquire the shares is a listed body corporate; or
- by issue, exchange and, or transfer of secured instruments of acquirer company with a minimum 'A' grade rating from a credit rating agency registered with the Board; or
- a combination above :

How shall the Payment of consideration be made ?

- If the consideration is payable in cash, the acquirer shall, within a period of 7 days from the date of closure of the offer, open a special account with a Bankers to an Issue registered with the Board, and deposit therein, such sum which together with 90% of the amount lying in the escrow account, if any, make up the entire sum due and payable to the shareholders as consideration for acceptances received and accepted and transfer the funds from the escrow account.
- The unclaimed balance lying to the credit of special account at the end of 3 years from the date of deposit , shall be transferred to the investor protection fund of

the regional stock exchange of the target company.

- In respect of consideration payable by way of exchange of securities, the acquirer shall ensure that the securities are actually issued and dispatched to the shareholders.

Escrow Account

The escrow account shall consist of :-

- **cash deposited with a scheduled commercial bank** - The acquirer shall, while opening the account, empower the merchant banker appointed for the offer to instruct the bank to issue a banker's cheque or demand draft for the amount lying to the credit of the escrow account,

OR

- **bank guarantee in favour of the merchant banker** - The bank guarantee shall be in favour of the merchant banker and shall be valid at least for a period commencing from the date of public announcement until 20 days after the closure of the offer.

OR

- **deposit of acceptable securities with appropriate margin, with the merchant banker** - In case the escrow account consists of securities, the acquirer shall empower the merchant banker to realise the value of such escrow account by sale ;if there is any deficit on realization of the value of the securities, the merchant banker shall be liable to make good any such deficit.

Notes :

- In case the escrow account consists of bank guarantee or approved securities, these shall not be returned by the merchant banker till after completion of all obligations under the Regulations.
- In case there is any upward revision of offer, consequent upon a competitive bid or otherwise, the value of the escrow account shall be increased to equal at least 10% of the consideration payable upon such revision.
- Where the escrow account consist of bank guarantee or deposit of approved securities, the acquirer shall also deposit with the bank a sum of at least 1% of the total consideration payable, as and by way of security for fulfillment of the obligations by the acquirers.
- In case of failure by the acquirer to obtain shareholders' approval required , the amount in escrow account may be forfeited.

The escrow amount shall be calculated as :-

- For consideration payable under the public offer, -
 - Upto and including Rs.100 crores - 25%;
 - exceeding Rs.100 crores - 25% upto Rs.100 crores and 10% thereafter.
- For offers which are subject to a minimum level of acceptance, and the acquirer does not want to acquire a minimum of 20%, then 50% of the consideration payable under the public offer in cash shall be deposited in the escrow amount.

Upward Revision of Offer

An acquirer who has made the public announcement of offer, may make upward revisions in his offer in respect to the price and the number of shares to be acquired, at anytime upto seven working days prior to the date of the closure of the offer, subject to following :

- By making a public announcement in respect of such changes or amendments in all the newspapers in which the original public announcement was made;
- Simultaneously with the issue of such public announcement, informing the Board, all the stock exchanges on which the shares of the company are listed, and the target company at its registered office.
- Increasing the value of the escrow account

Withdrawal of Offer

No public offer, once made, shall be withdrawn except under the following circumstances:-

- the statutory approvals that are required, have been refused;
- the sole acquirer, being a natural person, has died;
- such circumstances as in the opinion of the Board recommends withdrawal.

In the event of withdrawal of the offer under any of the circumstances specified, the acquirer or the merchant banker shall:

- Make a public announcement in the same newspapers in which the public announcement of offer was published, indicating reasons for withdrawal of the offer.
- simultaneously with the issue of such public announcement, inform -
 - the Board;
 - all the stock exchanges on which the shares of the company are listed; and
 - the target company at its registered office.